IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: March 5th, 2007

\+ CP No.303/2006 & CA No.190/2007
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M/s.Niyogi Offset Printing Press Ltd. ..... Petitioner
Through: Mr.Raja Chatterjee and
Ms.Eliane Muhury, Advocates

Versus

M/s.Doctor Morepen Limited ..... Respondent
Through: Nemo.

CORAM :-
*** HON'BLE MR. JUSTICE ANIL KUMAR**

1. Whether reporters of Local papers may be allowed to see the judgment? YES
2. To be referred to the reporter or not ? YES
3. Whether the judgment should be reported in the Digest? YES

ANIL KUMAR, J. (Oral)
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1. This order shall dispose of petition under Section 433(e) read with Section 434 of the Companies Act, 1956 seeking winding up of respondent, M/s.Doctor Morepen Limited.

2. The petitioner contended that he is a well known offset printing press in New Delhi and did printing work for the respondent during the

year 2002-2003. For the printing done by the petitioner for the respondent, bills had been raised by the petitioner on the respondent. According to the petitioner, the amounts of the bills were payable immediately.

3. The petitioner averred that respondent initially issued a cheque of Rs.1.50 lakh against the total due of Rs.17,29,807/- by cheque no.090543 dated 18th February, 2003. The said cheque was, however, dishonored with the remark "referred to drawer". When this fact was brought by the petitioner to the notice of the respondent, the cheque was again deposited but again it got dishonored with the remarks "referred to drawer".

4. For the amounts payable by respondent to the petitioner, by letter dated 24th January, 2003, it was confirmed that an amount of Rs.17,29,807/- is due from respondent to the petitioner and it was assured that the payment shall be made in installments starting from 3rd February, 2003 and finishing on 10th March, 2003.

5. The petitioner also relied on another letter dated 26th March, 2003 stipulating the tentative payment schedule from mid-April to mid-July

2003.

6. A demand notice dated 10th May, 2003 was raised demanding a sum of Rs.15,79,807/-. The last payment was made by the respondent to the petitioner by DD NO.10648 dated 7th March, 2003.

7. As the respondent had failed to make the payments to the petitioner a Company Petition No.12 of 2004 was filed by the petitioner in the High Court of Himachal Pradesh at Shimla on 20th December, 2004 after giving a notice under Section 434 of the Companies Act, 1956 on 28th July, 2003. The notice is alleged to have been sent to the registered office of the respondent at Parwano and a copy was sent to the office of the respondent at Delhi.

8. In the petition filed before the High Court of Himachal Pradesh at Shimla, an application under Section 10 of the Companies Act, 1956 read with Rules 3 and 31 of the Companies (Court) Rules, 1959 was filed by the respondent contending that company petition was filed in violation of Rules 27 and 28 of Companies (Court) Rules, 1959 and as the registered office of the respondent company is at Delhi, therefore, the petition in the High Court of Himachal Pradesh at Shimla was not

maintainable.

9. The application of the respondent being 71 of 2005 in Company Petition No.12 of 2004 in the High Court of Himachal Pradesh at Shimla was allowed holding that the High Court of Himachal Pradesh does not have territorial jurisdiction and consequently the petitioner withdrew the petition with liberty to approach the appropriate court for relief by order dated 14th July, 2005. The petitioner applied for the certified copy of the order dated 14th July, 2005, which was ready on 25th July, 2005 and was delivered to the petitioner on 25th July, 2005.

10. The petitioner thereafter sent a notice dated 19th August, 2006 under Section 434 of the Companies Act, 1956 and has filed the present petition seeking winding up of the respondent company and for determination of its assets in accordance with law.

11. Along with the petition, the petitioner has filed an application under Section 14 of the Limitation Act read with Section 19 of the Companies (Court) Rules, 1959 seeking condonation of delay in re-filing the winding up petition and has sought exclusion of time between 20th December, 2004 till 14th July, 2005 when the matter was pending before

the High Court of Himachal Pradesh at Shimla and the time from 15th July, 2005 till 27th July, 2005 on the ground that the certified copy was delivered to the respondent on 27th July, 2005 though the endorsement on the certified copy reflects that the certified copy was ready on 25th July, 2005.

12. I have heard the learned counsel for the petitioner in detail who has also relied on Ajab Enterprises Versus Jayant Vegoiles and Chemicals Private Limited AIR 1991 Bombay 35, to contend that as the petitioner was prosecuting with due diligence another company petition in the High Court of Himachal Pradesh at Shimla, therefore, in computing the period of limitation, the period spent at the Himachal Pradesh High Court be considered and the application under Section 14 be allowed and the present company petition filed at Delhi be held to be within time.

13. Perusal of the provisions of the Companies Act, 1956 reflects that no limitation is provided for filing the Company Petition under Section 433 or 434 of the Companies Act. However, while considering the application of the creditor for winding up of a company on the ground that the company is unable to pay its debt what is to be seen whether the

debt claimed by the creditor is within time or not and if the claim of the debt by the creditor is not within time whether the Company Court should initiate the process of winding up of company who has declined to pay a debt which is not within time.

14. Since no period of limitation is provided in filing the winding up petition, therefore, the application of the petitioner seeking condonation of delay in filing the winding up petition after the winding up petition filed in the High Court of Himachal Pradesh at Shimla was returned as not maintainable, the present petition can be filed by the petitioner.

15. On consideration of the averments made in the application, therefore, it appears that the petitioner is claiming that his claim against the respondent for recovery of Rs.15,79,807/- is within time as the time has to be excluded during which the petition for winding up was pending in the High Court of Himachal Pradesh at Shimla which is from 20th December, 2004 to 14th July, 2005.

16. The petitioner has also sought exclusion of time from 15th July, 2005 till 25th July, 2005 when the application for certified copy of the order dated 14th July, 2005 was applied and when it became ready on 25th

July, 2005 and was delivered to the petitioner on 25th July, 2005.

17. What is excluded under section 14 is the time during which another civil proceeding was prosecuted with due diligence relating to the same matter in issue in good faith in a court which, from defect of jurisdiction or other cause of similar nature became unable to entertain it. Section 14 of the Limitation Act, 1963 is as under:

> **14.Exclusion of time of proceeding bona fide in court without jurisdiction.-**
>
> (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it**.**
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> (2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it**.**
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> (3) Notwithstanding anything contained in Rule 2 of Order XXIII of the Code of Civil Procedure, 1908, the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the Court under rule 1 of that Order, where such permission is granted on the ground

that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature**.**

Explanation,--For the purposes of this section,**--**

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction**.**

18. One of the conditions required to be satisfied is that the proceedings taken earlier must be of same relief as claimed in the present proceedings as contemplated under Section 14 (2) of the Act. It has already been held that there is no limitation in filing an application under section 433 of the Companies Act, 1956 provided under the said Act. What is to be considered is whether the period of limitation to recover the amount shall be extended by filing a petition under section 433 of the Companies Act, 1963.

19. For application of section 14 (1) it is necessary to show that the civil proceedings which were taken earlier by the petitioner were relating

to the same matter in issue and the said matter was prosecuted in good faith in a Court which for the defect of jurisdiction or other cause of a like nature was unable to entertain it. A company petition for winding up in which ultimately the petitioner may get the amount due to him or some amount on pro rata basis does not necessarily mean that the matter in issue will be the same as in a suit for recovery of amount, had it been filed. In order to ascertain whether the claim of the petitioner is barred by time or not, what is to be considered is whether the petitioner can institute the suit for recovery of the amount claimed to be due from the respondent to the petitioner.

20. In Narayan Ambaji Chavan versus Hari Ganesh Navare, AIR 1930 Bombay 505, the High Court had refused to interfere on the ground that there was another remedy by way of suit in that matter and, therefore, it was held that in such a matter the condition necessary under section 14 of the Limitation Act, 1963 were not satisfied. In the present matter it is apparent that two remedies are available to the petitioner. One was to file a civil suit for recovery of amount allegedly due to the petitioner and the other to file a winding up petition. No limitation is provided for winding up petition under section 433 of the Companies Act, 1956 but filing a winding up petition will not save the limitation for filing the suit in the

facts and circumstances if the claim of the petitioner for recovery has become barred by time. In the present case for the amounts payable by respondent to the petitioner, by letter dated 24th January, 2003, it was confirmed that an amount of Rs.17,29,807/- is due from respondent to the petitioner and it was assured that the payment shall be made in installments starting from 3rd February, 2003 and finishing on 10th March, 2003. By another letter dated 26th March, 2003 another tentative payment schedule from mid-April to mid-July 2003 was given. A cheque of Rs.1.50 lakh against the total due of Rs.17,29,807/- bearing cheque no.090543 dated 18th February, 2003 was given. The said cheque was, however, dishonored with the remark "referred to drawer". When this fact was brought by the petitioner to the notice of the respondent, the cheque was again deposited but again it got dishonored with the remarks "referred to drawer". The last payment was made by the respondent to the petitioner by DD NO.10648 dated 7th March, 2003. Therefore, in these circumstances the cause of action lastly arose in favor of the petitioner and against the respondent to recover the amount on 7th March, 2003 and therefore, the suit for recovery of said amount could be filed by the petitioner till 6th March, 2006. Till this day the suit for recovery of the said amount has not been filed by the petitioner. Therefore, the claim of the petitioner to recover the amount due from the respondent has be-

come barred by time. Therefore the time spent by the petitioner in prosecuting company petition can not be excluded while computing the period of limitation under Section 14 of the Limitation Act, 1963.

21. The Supreme Court had held in Yeshwant Deorao v. Walchand Ramchand, 1950 SCR 852 that there can be no exclusion under section 14 of the Limitation Act of time spent in Insolvency proceedings against the judgment debtor, in computing the period of limitation for executing a decree against him, as the proceedings are not for obtaining the same relief. The Apex Court had held as under:

> 5. .....The relief sought in insolvency is obviously different from the relief sought in the execution application. In the former, an adjudication of the debtor as insolvent is sought as preliminary to the vesting of all his estate and the administration of it by the Official Receiver or the Official Assignee, as the case may be, for the benefit of all the creditors; but in the latter, the money due is sought to be realized for the benefit of the decree-holder alone, by processes like attachment of property and arrest of person. It may be that ultimately in the insolvency proceedings the decree-holder may be able to realize his debt wholly or in part, but this is a mere consequence or result. Not only is the relief of a different nature in the two proceedings but the procedure is also widely divergent.

22. *A fortiori* the time spent by the petitioner in winding up petition which is for different relief than seeking the relief of recovery, will not

save the limitation of the petitioner to recover the amount. Winding up petition is not for recovery of the amount. An adjudication of the debtor company as unable to pay its debt is sought as preliminary to the vesting of all his estate and the administration of it by the Official liquidator or the Official Assignee, as the case may be, for the benefit of all the creditors; but in the suit for recovery, the money due is sought to be recovered for the benefit of the creditor alone. It may be that ultimately in the winding up proceedings the petitioner may be able to realize his debt wholly or in part, but this is a mere consequence or result. Not only is the relief of a different nature in the two proceedings but the procedure is also widely divergent. The precedent relied on by the Petitioner AIR 1991 Bombay 35, Ajab Enterprises Vs Jayant Vegoils and Chemicals Pvt. Ltd rather lays down that the time spent in prosecuting winding up petition against company can not be excluded in computing the period of limitation for the claim of recovery of amount. Consequently the claim of the petitioner to recover the amount allegedly due from the respondent was barred on 4th December, 2006 when the present petition for winding up was filed and consequently the claim of the petition is barred by time.

23. It has been held in number of cases that an order under Section 433(e) of the Companies Act is discretionary. There must be a debt due

and the company must be unable to pay the same. A debt under this section must be a determined or a definite sum of money payable immediately or at a future date and that the inability referred to in the expression unable to pay its debts in Section 433(e) of the Companies Act should be taken in the commercial sense and that the machinery for winding up will not be allowed to be utilized merely as a means for realizing debts due from a company. The Bombay High Court has laid down the following principles in Softsule (P) Ltd., Re, (1997) 47 Company Cases 438: (Comp Cas pp. 443-44)

> Firstly, it is well settled that a winding-up petition is not legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. If the debt is not disputed on some substantial ground, the court/Tribunal may decide it on the petition and make the order.
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> Secondly, if the debt is bona fide disputed, there cannot be neglect to pay within the meaning of Section 433(1)(a) of the Companies Act, 1956. If there is no neglect, the deeming provision does not come into play and the winding up on the ground that the company is unable to pay its debts is not substantiated.
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> Thirdly, a debt about the liability to pay which at the time of the service of the insolvency notice, there is a bona fide dispute, is not due within the meaning of Section 434(1)(a) and non-payment of the amount of such a bona fide disputed debt cannot be termed as neglect to pay the same so as to incur the liability under Section 433(e) read with Section 434(1)(a) of the Companies Act, 1956.
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> Fourthly, one of the considerations in order to determine whether the company is able to pay its debts or not is

> whether the company is able to meet its liabilities as and when they accrue due. Whether it is commercially solvent means that the company should be in a position to meet its liabilities as and when they arise.

24. The Madras High Court in Tube Investments of India Ltd. v. Rim and Accessories (P) Ltd, (1993) 3 Company Law Journal 322, (Comp LJ at p. 326) has evolved the following principles relating to bona fide disputes:

> (i) if there is a dispute as regards the payment of the sum towards the principal, however small that sum may be, a petition for winding up is not maintainable and the necessary forum for determination of such a dispute existing between parties is a civil court;
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> (ii) the existence of a dispute with regard to payment of interest cannot at all be construed as existence of a bona fide dispute relegating the parties to a civil court and in such an eventuality, the Company Court itself is competent to decide such a dispute in the winding-up proceedings; and
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> (iii) if there is no bona fide dispute with regard to the sum payable towards the principal, it is open to the creditor to resort to both the remedies of filing a civil suit as well as filing a petition for winding up of the company.

25 The rules as regards the disposal of winding-up petition based on disputed claims are thus stated by the Apex Court in Madhusudan Gordhandas & Co. v. Madhu Woollen Industries (P) Ltd., (1971) 3 SCC 632. The Supreme Court has held that if the debt is bona fide disputed and the

defense is a substantial one, the court will not wind up the company. The principles on which the court acts are:

> (i) that the defence of the company is in good faith and one of substance;
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> (ii) the defence is likely to succeed in point of law; and
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> (iii) the company adduces prima facie proof of the facts on which the defence depends.

26. Generally speaking, an admission of debt should be available and/or the defense that has been adopted should appear to the Court not to be dishonest and/or a moonshine, for proceedings to continue. If there is insufficient material in favour of the petitioners, such disputes can be properly adjudicated in a regular civil suit. It is extremely helpful to draw upon the analogy of a summary suit under Order XXXVII of the Code of Civil Procedure. If the Company Court reaches the conclusion that, had it been exercising ordinary original civil jurisdiction it would have granted unconditional leave to defend, it must dismiss the winding-up petition.

27. The claim of the petitioner for recovery of the amount has become barred by time. If the petitioner files a suit for recovery of the said amount, the suit will be dismissed as barred by time. If the claim of the

petitioner to recover the amount has become barred by time, it will not be appropriate to initiate the process of winding up of the respondent company. Under section 433(e) of the Companies Act, 1956 the machinery for winding up can not be allowed to be utilized merely as a means for realizing debts due from a company which is also barred by time. Consequently there are no grounds to initiate the winding up proceedings against the respondent company. The petition, therefore, is without merit is liable to be dismissed. The petition therefore, is dismissed.

March 05, 2007 ANIL KUMAR, J.
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